

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 20, 2000 Session

WALLACE WAYNE WITHAM v. DARLA SMITHEY WITHAM

An Appeal from the Chancery Court for Shelby County
No. D29736-1 Walter L. Evans, Chancellor

No. W2000-00732-COA-R3-CV - Filed July 24, 2001

This is a post-divorce alimony dispute. The parties' marital dissolution agreement provided that the husband would pay the wife rehabilitative alimony for 24 months, or until Wife's death, remarriage, or cohabitation with an unrelated person of the opposite sex. The agreement also incorporated Tennessee Code Annotated § 36-5-101(a)(3), which provides for a rebuttable presumption that a third party living with an alimony recipient is contributing to the support of the recipient and that the recipient does not need the amount of alimony awarded. The husband filed a petition to terminate his alimony obligation, based on the wife's cohabitation with a third party. The trial court granted the husband's petition and terminated his obligation to pay alimony. The wife appeals. We reverse and remand, finding that the trial court erred in not considering testimony rebutting the presumption that the third party living with the wife was contributing to her support and that she no longer need the amount of financial support.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Reversed in Part, Affirmed in Part, and Remanded.

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S. and DAVID R. FARMER, J., joined.

Kathy Laughter Laizure and Nichole Elizabeth Soule , Memphis, Tennessee for the appellant, Darla Smithey Witham.

Stuart B. Breakstone, Memphis, Tennessee, for the appellee, Wallace Wayne Witham.

OPINION

This is a post-divorce alimony dispute. Wallace Wayne Witham (“Husband”) and Darla Smithey Witham (“Wife”) divorced in mid-August 1999. Incorporated in the parties’ final divorce decree and amended final divorce decree¹ was a previously executed Marital Dissolution Agreement (“MDA”). The MDA provided that Husband would pay Wife rehabilitative alimony in the amount of \$500 per month for “a period of 24 months, or until Wife’s death, remarriage, or cohabitation with an unrelated person of the opposite sex, whichever occurs sooner.” The MDA further provided that “notwithstanding the fact the said alimony is rehabilitative, the provisions of T.C.A. § 36-5-101(a)(3)² shall apply to said alimony.”

In October 1999, Husband filed a petition to terminate alimony, alleging that Wife was cohabitating with an unrelated person of the opposite sex in violation of the MDA. Wife subsequently filed a petition for contempt for failure to pay alimony and for division of property. The trial court heard both petitions on January 25, 2000.

At the January 2000 hearing, Husband testified that, beginning in late August 1999, he began noticing a “strange” truck parked outside of Wife’s residence every morning and evening as he traveled to and from work. Husband learned that the truck belonged to Rick Bradley (“Bradley”), a man from Kansas working in the Memphis area for a period of time. Husband then hired a private investigator to watch Wife’s apartment. The private investigator conducted surveillance of Wife’s residence from September 9, 1999 to October 16, 1999. In his report, the investigator said that he saw Bradley leave Wife’s apartment in the mornings and return in late afternoon. The investigator observed Bradley letting himself into Wife’s apartment with a key. The investigator reported that Bradley’s truck was parked in front of Wife’s residence on every occasion he conducted surveillance except for October 16, 1999, two days after Husband filed his petition.

¹The divorce decree was amended to formalize Wife’s name change from Witham to her maiden name Martin.

²Tennessee Code Annotated § 36-5-101(a)(3) provides:

(3) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that:

(A) The third person is contributing to the support of the alimony recipient and the alimony recipient therefore does not need the amount of support previously awarded, and the court therefore should suspend all or part of the alimony obligation of the former spouse; or

(B) The third person is receiving support from the alimony recipient and the alimony recipient therefore does not need the amount of alimony previously awarded and the court therefore should suspend all or part of the alimony obligation of the former spouse.

This subdivision (a)(3) shall in no way be construed to create any common-law marriage obligation as to third parties.

Wife testified that she let Bradley stay at her home temporarily until he located a place to live in the Memphis area. She asserted that she intended to let Bradley stay at her home only until a mutual friend, Patricia McConnell (“McConnell”), closed on the purchase of her house, at which time Bradley was to move in with McConnell.³ Wife and McConnell testified that, as planned, Bradley moved in with McConnell after she closed on her house in late September 1999. Bradley stayed with McConnell until mid-October, after which he rented his own apartment.

Wife testified that, during the period between August 1999 and October 1999, Bradley spent approximately 20 nights in her home. She testified that the nights Bradley stayed over were not consecutive, and that Bradley frequently returned to Kansas. Wife admitted that she and Bradley were romantically involved. However, she stated, for most of the nights Bradley spent at her home, she and Bradley did not sleep in the same bed because her daughter was in the apartment. Wife testified that Bradley did not have a key to her apartment. Rather, she left a key on the top of a light located outside her apartment door, so that he could get into the apartment when she was not there. She said that he did not keep furniture or clothing at her apartment or even unpack his suitcase when he stayed there. She said that Bradley bought his own groceries, which she and her daughter rarely shared, and that he paid none of the household bills, only reimbursed her for long-distance telephone calls he made. Wife sought to present evidence as to her need for the alimony, but was not permitted to do so. The trial court determined that evidence as to Wife’s need for alimony was not relevant to the trial court’s determination of whether the terms of the MDA were violated.

The trial court denied Wife’s petition for contempt, finding that Husband had “purged himself of any potential contempt” prior to the hearing. The trial court found that Wife had violated the terms of the MDA by cohabitating with Bradley and, pursuant to the terms of the MDA, terminated her rehabilitative alimony. Rather than terminating the alimony retroactively to the date Husband filed his petition, the trial court made the termination effective January 31, 2000. The trial court stated that alimony payments in the interim would offset Wife’s request for attorney’s fees for her contempt petition. The parties were ordered to pay their own attorney’s fees in relation to Husband’s petition to terminate alimony. The trial court denied Wife’s subsequent motion to alter and amend. Wife now appeals.

On appeal, Wife argued that the trial court erred in granting Husband’s petition because she was not cohabitating with Bradley. She contends that the evidence presented does not rise to the level of cohabitation within the meaning of Tennessee law or as the term was understood by the parties when they entered into the MDA. Wife also argues that the trial court erred in its interpretation of the MDA. She asserts that, even if she were cohabitating with Bradley, since the MDA incorporates Tennessee Code Annotated § 36-5-101(a)(3), before the trial court could terminate the alimony, it was required to find that she failed to rebut the presumption that (1) Bradley was contributing to her support or receiving support from her and (2) that, consequently, she no longer needed the amount of alimony awarded. Wife asserts that she rebutted the presumption

³Bradley had been friends with McConnell’s recently deceased husband.

through her uncontroverted testimony that Bradley was not contributing to her support nor she to his. Wife also seeks attorney's fees.

Husband argues that the trial court properly terminated the alimony because Wife's actions constituted cohabitation as understood by the parties and under Tennessee law. He also argues that the trial court correctly interpreted the terms of the MDA. He asserts that there was no evidence which rebutted the presumption that Bradley was being supported by Wife during his time in Memphis. Rather, Wife's testimony that Bradley paid her no rent when he was living with her supports that presumption.

An MDA is a contract between a husband and wife in contemplation of divorce. As such, it is generally subject to the rules governing the construction of contracts. *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001). Since the interpretation of a contract is a matter of law, our review is *de novo* on the record with no presumption of correctness in the trial court's conclusions of law. *Union Planters Nat'l Bank v. American Home Assurance Co.*, 865 S.W.2d 907, 912 (Tenn. Ct. App. 1993). In the absence of fraud or mistake, a contract must be interpreted as written, giving the words expressing the parties' intentions their usual, natural and ordinary meaning. *See Gray v. Estate of Gray*, 993 S.W.2d 59, 64 (Tenn. Ct. App. 1998).

In this case, the MDA required that Husband pay Wife rehabilitative alimony for "a period of 24 months, or until Wife's death, remarriage, or cohabitation with an unrelated person of the opposite sex, whichever occurs sooner." The MDA then provided that the provisions of Tennessee Code Annotated § 36-5-101(a)(3) would apply, despite the fact that Section 36-5-101(a)(3) pertains to alimony *in futuro* and the MDA provides only for rehabilitative alimony. *See Stockman v. Stockman*, No. 01A01-9801-CH-00026, 1999 WL 617637, at **3-4 (Au. 17, 1999). Section 36-5-101(a)(3) establishes a rebuttable presumption that a recipient spouse living with a third person no longer needs the amount of alimony previously awarded because the third person is either contributing support to the recipient spouse or receiving support from the recipient spouse.⁴ The presumption created by subsection (a)(3) does not automatically cut off the right to receive alimony payments. Rather, once the presumption arises, the recipient spouse bears the burden of showing a need for the amount of alimony awarded, notwithstanding the cohabitation. *See Stockman*, 1999 WL 617637 at *2 & n.2 (citing *Azbill v. Azbill*, 661 S.W.2d 682, 686 (Tenn. Ct. App. 1983) and *Isbell v. Isbell*, 816 S.W.2d 735, 738 (Tenn. 1991)).

As noted above, Tennessee Code Annotated § 36-5-101(a)(3) and its statutory rebuttable presumption does not, by its terms, apply to rehabilitative alimony. *See Stockman*, 1999 WL 617637 at **3-4. However, the MDA in this case specifically incorporates the statute:

Husband shall pay to Wife, as rehabilitative alimony, the sum of \$500 per month for a period of 24 months, commencing with date of execution of this Agreement. Husband shall pay alimony for a period of 24 months, or until Wife's death,

⁴See footnote 2.

remarriage, or cohabitation with an unrelated person of the opposite sex, whichever occurs sooner. The parties agree that notwithstanding the fact the said alimony is rehabilitative, that the provisions of T.C.A. § 36-5-101(a)(3) shall apply to said alimony.

The language of the MDA, particularly since the statute is incorporated after it states that the rehabilitative alimony is terminable if Wife cohabits with an unrelated person of the opposite sex, makes it clear that the parties intended to incorporate the rebuttable presumption set forth in the statute. Consequently, if the trial court finds that Wife was “cohabiting” with Bradley before it can terminate Husband’s obligation to pay alimony, it must give Wife the opportunity to rebut the presumption that (1) Bradley was contributing to Wife’s support or receiving support from Wife and (2) Wife does not need the amount of rehabilitative alimony awarded. In the trial court below, such evidence was not considered. An offer of proof was taken as to a portion of the rebuttable presumption, i.e. whether Bradley was contributing to Wife’s support or Wife was contributing to Bradley’s support, but evidence on Wife’s continued need for the amount of alimony awarded was not permitted. Accordingly, the trial court’s decision to terminate alimony, based only on its finding of cohabitation, must be reversed, and the cause remanded for further evidence from the parties on the rebuttable presumption set forth in Tennessee Code Annotated § 36-5-101(a)(3). This holding pretermits issues regarding the correctness of the trial court’s finding that Wife cohabited with Bradley.

Wife also seeks her attorney’s fees at the trial and appellate levels. The trial court is afforded discretion concerning whether to award attorney’s fees in a divorce case. *See Long v. Long*, 957 S.W.2d 825, 827 (Tenn. App. 1997). On appeal, an appellate court shall not interfere with the trial court’s decision except upon a showing of an abuse of that discretion. *Id.* Wife argues that she is entitled to attorney’s fees because the MDA provides that “[s]hould either party fail to abide by or perform the agreements herein, he or she shall be liable to the other party for all reasonable attorney fees, costs, and expenses incurred by the other in securing performance.” However, Husband’s petition to terminate alimony did not constitute a failure to abide by or perform under the MDA. Moreover, Husband continued to pay alimony from the date the petition was filed until the date of the hearing. Under these circumstances, the trial court did not abuse its discretion, and its decision to require each party to pay his or her own attorney’s fees is affirmed. We decline to award Wife attorney’s fees on appeal.

The decision of the trial court is reversed in part, affirmed in part, and remanded as set forth in this Opinion. Costs are taxed to the appellee, Wallace Wayne Witham, and his surety, for which execution may issue if necessary.

HOLLY K. LILLARD, JUDGE